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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

COLUMBIA BROADCASTING SYSTEM, INC.,
A CORPORATION,
Petitioner,

VS.

THE HONORABLE OMER POOS, CHIEF JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS, SOUTHERN DIVISION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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OPINIONS BELOW.

The Seventh Circuit denied the petition of Columbia Broadcasting System, Inc. for a writ of mandamus without opinion; a copy of the order of denial is reproduced in Appendix "A", *infra.* The order of the District Court denying the motion of Columbia Broadcasting System, Inc. to transfer the cause to the Northern District of Illinois, Eastern Division, is unreported but is reproduced in Appendix "B", *infra.*

JURISDICTION.

The order of the Seventh Circuit was entered on October 21, 1969. The jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1254.

QUESTIONS PRESENTED.

(1) Whether protection and encouragement of First Amendment rights of free speech and press compel the granting of a transfer motion under 28 U. S. C. § 1404(a) *in a libel suit brought by one who is a public official or a* public figure under the doctrine of *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), when the district chosen by the plaintiff has no relationship or connection with the lawsuit and is manifestly an inconvenient forum for the trial.

(2) When all the prescribed standards in favor of transferring a case under § 1404(a) are clearly met, and the forum selected by the plaintiff has no relationship or connection with the lawsuit, may the District Court properly refuse to transfer on the ground that the plaintiff's choice of forum is of controlling weight?

STATUTE INVOLVED.

The statute governing transfer of causes from one district to another is 28 U. S. C. § 1404(a); it provides:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

STATEMENT OF THE CASE.

(a) General Walker's Suit for Defamation.

The plaintiff below is Edwin A. Walker, a retired Major General and a resident of Texas. In the fall of 1962, General Walker traveled from Texas to the University of Mississippi to attend the racial disturbances and conflicts there raging over the matriculation of the school's first

Negro student; the General's presence, actions and statements during the stormy events on the Mississippi campus were the subject of national publicity and controversy.

General Walker later filed 18 suits for defamation against news publishers and other media for reporting his acts and utterances at the Mississippi race riots; most of the suits were filed in Southern or border states or rural areas.[1] In the first suit to reach trial, General Walker was awarded a verdict of $500,000 in the District Court of Tarrant County, Texas; the judgment was later reversed by this Court in *Associated Press* v. *Walker*, 388 U. S. 130 (No. 150, Oct. Term 1966)[2] on the grounds that General Walker was a public figure and had failed to meet his burden of proving actual malice under *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964).

General Walker's suit in the instant case is against the petitioner, Columbia Broadcasting System, Inc. (CBS); Walker claims he was defamed in a radio broadcast that occurred in Chicago, Illinois over Station WBBM, owned by petitioner CBS. The broadcast was an evening "telephone talk" show on September 16, 1967, in which a WBBM announcer, Donald Cannon, discussed with an unidentified caller General Walker's activities at the Mississippi riots; Cannon allegedly said that General Walker stated, "Let's go kill them, men," and that General Walker spent time in a mental hospital.

General Walker filed the suit in the U. S. District Court for the Southern District of Illinois, Southern Division, sitting in Springfield. Springfield, Illinois is some two hundred miles south of Chicago.

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1. Appendix C, *infra*, contains a complete list of General Walker's 18 libel suits and the jurisdictions in which they were filed.

2. Decided together with *Curtis Publishing Co.* v. *Butts* (No. 37, Oct. Term, 1966).

(b) The Motion to Transfer.

The petitioner CBS filed a timely motion to transfer General Walker's suit to Chicago, *i.e.*, the Northern District of Illinois, Eastern Division, pursuant to 28 U. S. C. § 1404(a). The motion and supporting affidavits established without dispute that *none* of the parties and *none* of the witnesses resided in the Southern District of Illinois, and *none* of the events relevant to the suit occurred there. Thus, the record demonstrated:

(a) The defendant's radio station that broadcast the alleged defamation, WBBM, is located in Chicago;

(b) Station WBBM's primary signal, listening audience and market are outside the Southern District of Illinois and are in fact in the metropolitan area of Chicago and Cook County;

(c) All of Station WBBM's employees resided in Chicago (or Cook County);

(d) The announcer of the program that Walker attacks resided in Chicago;

(e) No known witnesses resided in the Southern District of Illinois;

(f) The plaintiff General Walker resides in Texas and not the Southern District of Illinois;

(g) Defendant CBS is incorporated in New York and has no relevant place of business or property within the State of Illinois except in Chicago.

The announcer of the program in question, Donald Cannon, was named a defendant to the suit along with CBS, but he was never served. In support of its motion to transfer the cause to Chicago, CBS filed an affidavit by Cannon establishing that the travel and time necessary for him to testify in Springfield, rather than Chicago, would

result in severe personal hardship to his wife and children and would handicap him in his job.

General Walker filed no counter-affidavits in opposition to the motion to transfer; he instead filed a Memorandum stating that if CBS would admit the allegations of the complaint, there would be no contested issues of fact and thus no need for a trial in any forum. With regard to announcer Cannon's affidavit of hardship, General Walker's Memoradum stated:

> "The defendant Cannon's affidavit states no ground proper for consideration on a motion to transfer. His 3:00 p.m. broadcasts can be recorded in advance for the day of trial, and he can fly back on any given day in time to make his 9:00 p.m. broadcasts. . . ."[3]

The motion for transfer was denied by Judge Omer Poos of the Southern District of Illinois, Southern Division on June 11, 1969. The brief order of denial (see Appendix B, *infra*) states:

> "It is the opinion of this Court that, all things being considered, including court trial docket calendars, number and locality of witnesses, among other matters, *a party plaintiff is entitled to his choice of forum if at all feasible* and if the forum is one provided for by law." (Emphasis added.)

(c) The Order of the Seventh Circuit.

CBS filed a petition for writ of mandamus in the Seventh Circuit to review and set aside the District Court's denial of the motion to transfer under § 1404(a).[4] The petition,

3. After CBS filed its mandamus petition in the Seventh Circuit, General Walker voluntarily dismissed Cannon as a party defendant. However, Cannon is still, of course, a prospective witness of great importance to CBS.

4. It is clear that mandamus is the correct procedure to review the denial of a § 1404(a) transfer motion. *Van Dusen* v. *Barrack*, 376 U. S. 612 (1964), and authorities cited therein.

supported by affidavits and exhibits, contended that all standards governing transfer of cases prescribed in § 1404(a) were clearly met; the petition also urged that forcing the defendant to stand trial in a district chosen by Walker and unrelated to the suit would seriously impair and infringe First Amendment rights of free speech and press.

The Seventh Circuit granted leave to file the petition for mandamus and ordered General Walker to file an answer. Then, without receiving briefs and without hearing argument, the Seventh Circuit denied the petition for mandamus. The order denying the petition states:

> "On consideration of petitioner's request for mandamus and respondent's reply thereto, we find that petitioner has not shown that respondent has clearly abused his discretionary power pursuant to § 1404(a) and, consequently, mandamus is not appropriate. See *Butterick Co.* v. *Hubert L. Will,* 316 F. 2d 111, 113 (7th Cir. 1963)." (Appendix "A", *infra.*)

CBS now seeks certiorari to review the Seventh Circuit's decision.

REASONS FOR GRANTING THE WRIT.

We submit this case clearly presents an important question of federal law that has not been, but should be, settled by this Court. The prescribed standards for transfer of cases under § 1404(a) have never been considered by this Court in the unique First Amendment context of a libel action in which the plaintiff is a public official or a public figure within the meaning of *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (1964), and its progeny. The courts below held that in such a case the *plaintiff's choice of forum alone* is the paramount and controlling factor for deciding a transfer motion under § 1404(a); there is no good reason to believe that the lower courts gave any serious weight to other factors, and particularly to the gravely inhibiting effect that denial of transfer will have upon the exercise of First Amendment rights.

We think that in such cases the plaintiff's choice of forum cannot constitutionally be the factor to control decision of a transfer motion. Otherwise, libel plaintiffs such as General Walker will naturally choose districts where the defendant will be financially burdened, inconvenienced and disadvantaged in defending the suit, and where the local climate is favorable to the plaintiff's viewpoints and personality. The result will be to chill and suppress the free exercise of valued First Amendment rights of speech and press by forcing publishers to trial in distant, alien or hostile forums.

The instant case is especially appropriate for in-depth consideration of § 1404(a) transfer standards in the context of the First Amendment. This Court has already held that the plaintiff, General Walker, is a public figure within the *New York Times* doctrine, by virtue of

his voluntary attendance and conduct at the University of Mississippi racial disturbances. *Associated Press* v. *Walker*, 388 U. S. 130, 155 (1967). The allegedly defamatory words in this case concern the same activities and conduct of General Walker that were involved in *Associated Press* v. *Walker*. Moreover, the record is crystal clear that General Walker has selected a district that has no connection or relationship with his suit against CBS; no parties or witnesses reside in the Springfield district and no events related to the suit occurred there. The record is equally clear that the Chicago district to which transfer is sought has as close—if indeed not the closest—connection with the suit as any district in the country; trial in Chicago would manifestly be more convenient and economical to the parties and the witnesses than trial in Springfield.

We turn first to the importance of reviewing the decision below from the standpoint of fostering basic First Amendment rights of free speech and press.

I. THE PRINCIPLES AND OBJECTIVES OF THE FIRST AMENDMENT COMPELLINGLY FAVOR GRANTING A MOTION TO TRANSFER UNDER § 1404(a) IN A DEFAMATION SUIT SUCH AS WALKER'S.

This Court's decisions have repeatedly stressed the critical importance of protecting and encouraging free exercise of the preferred rights of speech and press under the First Amendment; the Court has aptly described these rights as ones that "we value most highly" and that "are essential to the workings of a free society." *Speiser* v. *Randall*, 357 U. S. 513, 321 (1958). See also, *e.g.*, *DeJonge* v. *Oregon*, 299 U. S. 353, 364 (1937); *Stromberg* v. *California*, 283 U. S. 359, 369 (1932). The necessity of safeguarding and stimulating free public discussion and debate has received

strongest emphasis in the line of "public official" and "public figure" libel cases led by *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (1964). *E.g., Garrison* v. *Louisiana,* 379 U. S. 64 (1964); *Henry* v. *Collins,* 380 U. S. 356 (1965); *St. Amant* v. *Thompson,* 390 U. S. 727 (1968).

In *New York Times,* the Court clearly recognized that the inordinate expense of defending libel actions and the fear of enormous jury verdicts are a significant deterrent to free and uninhibited public discussion; the cardinal and expressed purpose of the *New York Times* doctrine is to reduce "self-censorship" by publishers to a minimum:

> "[W]ould be critics . . . may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court *or fear of the expense of having to do so.* They tend to make only statements which 'steer far wider of the unlawful zone.' *Speiser* v. *Randall, supra,* 357 U. S. at 526. The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments." *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 279 (1964). (Emphasis added.)

So also, the Court declared in *Time, Inc.* v. *Hill,* 385 U. S. 374, 389 (1967):

> "Fear of large verdicts in damage suits for innocent or mere negligent misstatement, *even fear of the expense involved in their defense,* must inevitably cause publishers to 'steer . . . wider of the unlawful zone,' *New York Times Co.* v. *Sullivan,* 376 U. S. 279; see also *Speiser* v. *Randall,* 357 U. S. 513, 526; *Smith* v. *California,* 361 U. S. 147, 153-154; and thus 'create the danger that the legitimate utterance will be penalized.' *Speiser* v. *Radall, supra,* at 526." (Emphasis added.)

And see *Dombrowski* v. *Pfister,* 380 U. S. 479, 487 (1965):

> "The chilling effect upon the exercise of First Amendment rights may derive from the fact of the

prosecution, unaffected by the prospects of its success or failure."

The suppressiveness and the chilling effect of libel suits upon First Amendment rights are severe enough when the suits are brought in the defendant's home forum; the courts have recognized that defense of libel actions often entails unusual and excessive expense. *Time, Inc.* v. *McLaney,* 406 F. 2d 565 (5th Cir. 1969), *cert. denied,* 395 U. S. 922; *Washington Post Co.* v. *Keogh,* 365 F. 2d 965 (D. C. Cir. 1966), *cert. denied,* 385 U. S. 1011 (1967). Clearly, the chilling effect of such actions will be inevitably increased and intensified if plaintiffs, such as General Walker here, may require defendants to transport witnesses and evidence and stand trial in distant, inconvenient and strange forums having no connection or relationship with the lawsuit, and picked solely at the whim of the plaintiff. If those who would speak and write about the people and affairs of the day are faced with such an expensive and dangerous exposure, they will manifestly be more reluctant and unwilling to speak or publish.

General Walker did not originate the tactic of suing for libel in a jurisdiction inconvenient, unfamiliar or hostile to the defendant; the tactic has long been a peculiar favorite of those who would silence or suppress all criticism of their conduct and viewpoints concerning controversial public issues.[5] The propensity of libel plaintiffs to sue

5. The practice dates back at least to the Star Chamber, which heard all cases of seditious libel or "libel on government," *i.e.,* any published criticism of the Crown or the affairs of royalty. The Star Chamber tried its victims in London regardless of the situs of their "crimes"; even foreigners whose alleged crimes occurred outside England were forced to travel to London for "trial" and inevitable punishment (consisting of unbelievable physical torture and fines). See Burn, *The Star Chamber,* pp. 14-15 (London, 1870); Bruce, *An Outline of the History of the Court of Star Chamber,* p. 351 (1833). Later the practice was utilized during the colonial period in this country, both by the

(Cont'd next page.)

publishers away from their home base has increased significantly since the inception of *New York Times Co.* v. *Sullivan.* Indeed, the plaintiff Sullivan in that case, together with the eleven other southern officials who sued the *New York Times* for publishing views critical of segregation in the South, brought their suits in Alabama, the forum most likely to convict the *Times.* See *Parks, et al.* v. *New York Times Co.,* 195 F. Supp. 919 (M. D. Ala. 1962); *New York Times Co.* v. *Connor,* 365 F. 2d 567 (5th Cir. 1966). Public officials and public figures have subsequently followed the same practice with increasing frequency;[6] General Walker himself has in fact been the standard-bearer of the movement.

In Appendix C, *infra,* we have listed all of the eighteen libel suits that General Walker has filed since 1963. In six of these cases, General Walker sued the Associated Press in southern states (Arkansas, Louisiana, Mississippi, Florida, Missouri and Texas); most of the remaining actions were brought in southern or border states or rural areas. Clearly, General Walker more than any other libel plaintiff has exhibited a pattern of suing his critic-adversaries in jurisdictions that are either inconvenient or unfavorable to the defendant, or both.

Several courts have recognized the tactic of suing publishers in distant forums as a grave threat to First Amend-

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Crown and some of the colonial governments, to stifle political dissent and public unrest. See Levy, *Legacy of Suppression,* pp. 32-34 (Harvard Univ. Press, 1960). Even after the Constitution was ratified, there have been repeated attempts by would-be suppressers and censors to try their critics in distant and alien forums. See, *e.g., In re Dana,* 6 Fed. Cas. No. 3554 (1873); *United States* v. *Smith,* 173 Fed. 227 (D. C. Ind. 1909). And see especially the Brief of the Tribune Company as Amicus Curiae in *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (1954), pages 2-10.

6. See, *e.g., Curtis Publishing Co.* v. *Birdsong,* 360 F. 2d 344 (5th Cir., 1966); *Buckley* v. *New York Times Co.,* 338 F. 2d 470 (5th Cir., 1964).

ment freedoms of speech and press, and have refused to permit service of process under state "long arm" statutes, upon the ground that the defendant publishers did not have sufficient contacts with the forum under the doctrine of *International Shoe Co.* v. *Washington,* 326 U. S. 310 (1945). *E.g., New York Times Co.* v. *Connor,* 365 F. 2d 567 (5th Cir. 1966); *Buckley* v. *New York Times Co.,* 338 F. 2d 470 (5th Cir. 1964). In fact, three of General Walker's libel suits have been dismissed upon the ground that the defendant publishers had insufficient contacts to permit "long arm" service. *Walker* v. *Field Enterprises, Inc.,* 332 F. 2d 632 (10th Cir. 1964); *Walker* v. *General Features Corp.,* 319 F. 2d 583 (10th Cir. 1963); *Walker* v. *Savell,* 335 F. 2d 536 (5th Cir. 1964).[7] Signally, in *Walker* v. *Savell, supra,* the Fifth Circuit thus perceived and expressed the constitutional basis for distinguishing between foreign publishers and defendants in other kinds of tort suits:

> "Moreover, . . . we think there is peculiar significance in the application of this rule to foreign corporations or parties that may be clothed with some of the constitutional protections dealing with freedom of the press. . . . We think there is reason for such a distinction because of the inherent danger or threat to the free exercise of the right of freedom of the press if jurisdiction in every state can be inferred from minimal contacts." (335 F. 2d at 543-44.)

The same reasoning applies with equal force to motions for transfer of libel suits under § 1404(a). If the decision below refusing transfer is allowed to stand, it will be an open invitation for libel plaintiffs such as General Walker to hand-pick districts that will be inconvenient and unfavor-

7. In the *Field Enterprises* case, General Walker attempted to sue the publisher of the *Chicago Daily News* in Oklahoma; the *News* had a daily circulation of 26 newspapers in Oklahoma. In the *General Features case,* Walker brought suit in Oklahoma against a New York news feature syndicate that had sold the allegedly libelous article to the *Chicago Daily News.*

able for the defendants; we respectfully urge that certiorari be granted to consider the decision's grave impact and chilling effect on First Amendment rights.

II. THE DECISION BELOW MANIFESTLY DISREGARDS AND THWARTS THE GOVERNING STANDARDS FOR TRANSFER PRESCRIBED IN § 1404(a).

In addition to the First Amendment issue, this case presents an important question concerning the construction and application of the transfer statute that has not been, but should be, resolved by this Court.[8] Section 1404(a) specifically prescribes three, and only three, criteria or standards to be applied in deciding a motion for transfer: (1) the convenience of parties, (2) the convenience of witnesses, and (3) the interest of justice. In the instant case, the District Court patently did not consider the specific criteria prescribed in the statute, save in the most cursory lip-service fashion. Indeed, it is manifest that the District Court, instead of evaluating and applying the three criteria of § 1404(a), considered and gave controlling weight to a factor not prescribed in the statute, *i.e.*, the plaintiff's selection of forum. Thus, the District Judge in denying transfer stated:

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8. The importance and the salutary purposes of the transfer statute have been aptly described by this Court in *Van Dusen* v. *Barrack*, 376 U. S. 612, 616 (1964) as follows:

> "Section 1404(a) reflects an increased desire to have federal civil suits tried in the federal system at the place called for in the particular case by considerations of convenience and justice. Thus, as the Court recognized in *Continental Grain Co.* v. *Barge FBL-585*, 364 U. S. 19, 26, 27, the purpose of the section is to prevent the waste 'of time, energy and money' and 'to protect litigants, witnesses and the public against unnecessary inconvenience and expense. . . .' To this end it empowers a district court to transfer 'any civil action' to another district court if the transfer is warranted by the convenience of parties and witnesses and promotes the interest of justice."

See also *Hoffman* v. *Blaski*, 363 U. S. 335 (1960).

> "It is the opinion of this Court that, all things being considered, including court trial docket calendars, number and locality of witnesses, among other matters, *a party plaintiff is entitled to his choice of forum if at all feasible* and if the forum is one provided for by law." (Emphasis added.)

Although some prior cases under § 1404(a) have stated that the plaintiff's choice of forum is entitled to consideration, none has held it to be supreme over all other factors. On the contrary, the far stronger weight of authority holds that the plaintiff's choice of forum is the *least* important factor *when that forum has no connection or relationship with the lawsuit and none of the parties or witnesses reside there,* as in the case at bar. Thus, the court in *Morgan* v. *Illinois Central Ry. Co.,* 161 F. Supp. 119, 120 (S. D. Tex. 1958) held:

> "Where, however, as here, none of the operative facts occurred within the forum of original selection, the plaintiff's choice is entitled to only minimal consideration."

And, in *Cressman* v. *United Air Lines,* 158 F. Supp. 404, 407 (S. D. N. Y. 1958), the court held:

> "Though plaintiff's choice of forum is a significant factor to be considered, where the plaintiff brings suit in a jurisdiction which is neither his home forum, nor has any connection whatever with the matter in controversy, that choice is to be accorded less weight than would ordinarily be the case."

Other cases so holding are legion. *E.g., Early & Daniel* v. *Wedgefield, Inc.,* 164 F. Supp. 414 (M. D. N. C. 1958); *Josephson* v. *McGuire,* 121 F. Supp. 83 (D. Mass. 1954); *McHoney* v. *Marine Transport Lines, Inc.,* 117 F. Supp. 312 (S. D. N. Y. 1953); *Rodgers* v. *Northwest Airlines, Inc.,* 202 F. Supp. 309 (S. D. N. Y. 1962); *United States* v. *General Motors Corp.,* 183 F. Supp. 858 (S. D. N. Y. 1960). The

decision below is clearly in conflict with the above-cited authorities and it stultifies both the letter and the spirit of § 1404(a). (See *Van Dusen* v. *Barrack, supra,* p. 13, n. 8). Indeed, if the plaintiff's selection of forum is to be given controlling weight over the criteria set forth in § 1404(a) we submit the statute in plain effect has been repealed.

Although the Seventh Circuit in denying the writ of mandamus stated that no abuse of the District Court's "discretionary power" had been shown (Appendix A, *infra*), we submit that the refusal to transfer this case cannot be so supported or rationalized. By granting leave to file the petition for mandamus, requiring an answer and then denying the writ, the Seventh Circuit clearly approved and endorsed the District Court's holding that plaintiff's choice of forum is of controlling force. If the District Court had properly evaluated and applied the governing criteria of § 1404(a), instead of holding plaintiff's selection of forum to be paramount, we submit the cause would have been transferred. Thus, the record shows with respect to each of the three criteria specified in § 1404(a):

1. *Convenience of the Parties.* Beyond any question, no party would find trial in Springfield, Illinois more convenient than Chicago. The petitioner CBS will certainly find trial in Chicago most convenient because its radio station, WBBM, its employees, and its sole offices in Illinois are located in Chicago. Nor can the plaintiff, General Walker, who resides in Texas, seriously claim that Springfield would be more convenient than Chicago for trial; it is manifestly as easy (or easier) to obtain airline or other travel connections between Texas and Chicago rather than Texas and Springfield.

2. *Convenience of the Witnesses.* It is clear that the vast majority of witnesses—if not all of them—who heard

the allegedly defamatory broadcast live either in Chicago or much closer to Chicago than Springfield, Illinois. Since Station WBBM's primary signal, listening audience and market area are in the metropolitan area of Chicago rather than Springfield, it is entirely possible that no resident of the Springfield, Illinois area heard the broadcast in question (see Statement of the Case, p. 4, *supra;* see also, Exhibit "G" to the Petition for Mandamus in the Court of Appeals). Moreover, since a pivotal issue at the trial will be that of actual malice, *i.e.*, knowledge of falsity or the harboring of serious doubts as to truth or falsity (*New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964); *St. Amant* v. *Thompson*, 390 U. S. 727 (1968)), testimony will be required concerning the basis upon which the announcer made the allegedly defamatory statement and the efforts defendant took to prevent broadcasting of defamatory statements. The witnesses who would testify for the petitioner CBS on the malice issue are in Chicago or Cook County. General Walker has made no indication of what witnesses he would propose to call (besides himself); it is quite clear, however, that if he calls witnesses from the scene of the Mississippi riots or his home state of Texas, it would just as easy, if not easier, for such witnesses to travel to Chicago rather than Springfield, Illinois.

3. *The Interest of Justice.* In determining the "interest of justice" standard of § 1404(a), the courts have held[9] that several factors should be evaluated, all of which clearly preponderate in favor of litigating General Walker's suit in Chicago rather than Springfield, Illinois. Thus:

(a) *Availability of Compulsory Process to Compel the Attendance of Unwilling Witnesses.* If the suit is

9. *E.g., A. C. Samford, Inc.* v. *United States*, 226 F. Supp. 72, 78-79 (M. D. Ga. 1963); *United States* v. *General Motors Corp.*, 183 F. Supp. 858, 860-62 (S. D. N. Y. 1960); *Rhodes* v. *Barnett*, 117 F. Supp. 312, 315 (S. D. N. Y. 1953).

tried in the Southern District of Illinois, no party could compel an unwilling witness living in Chicago or elsewhere outside the Southern District to testify (*Federal Rules of Civil Procedure,* Rule 45(e) (1)). No known witnesses reside in the Southern District.

(b) *The Smaller Amount of Expenses Required for Willing Witnesses.* Petitioner CBS would incur costs in excess of $500 per day for each employee-witness required to travel to Springfield for trial (see Exhibit "D" to the Petition for Mandamus in the Court of Appeals). As to other witnesses from the Chicago area, it would manifestly be much more expensive for them to appear and testify in Springfield rather than Chicago.

(c) *Whether Any Controverted Issue of Fact Depends upon Any Event Occurring in the District Selected by Plaintiff.* No operative fact or controverted issue depends upon *any* event occurring in the Southern District of Illinois, Southern Division. (See Statement of the Case, *supra,* at page 4). See *Morgan* v. *Illinois Central Ry. Co.,* 161 F. Supp. 119 (S. D. Texas 1958).

(d) *Ease of Access to Sources of Proof.* There are clearly no sources of proof in the Southern District of Illinois. Many if not all known sources of relevant proof are in fact in the Chicago area since the petitioner's radio station, WBBM, is located there, and its employees and pertinent files and records are there also. (See Statement of the Case, *supra,* at page 4).

In light of all the above factors we submit that the failure to order transfer was rank error and in fact flouts the entire purpose and intent of § 1404(a).

Finally, a factor that was referred to by the District Judge in his order refusing transfer requires mention and

refutation, *i.e.*, "court trial docket calendars" (Appendix "B", *infra*). The refusal to transfer clearly cannot be supported on the ground that the docket is more congested, or the time for disposing of cases is longer, in the Northern District of Illinois than in the Southern District. The Northern District of Illinois has eleven district judges and the Southern District has two. (28 U. S. C. § 133.) The official *Report of the Business of the Federal Courts of the Seventh Judicial Circuit* for the year ending December 31, 1968 (prepared and issued by the Clerk of the Seventh Circuit) plainly demonstrates that cases are tried and disposed of as expeditiously in the Northern District as they are in the Southern District of Illinois.[10]

In sum, we think that the District Court not only abused its discretion but committed palpable error in refusing to transfer the case when all of the express criteria set forth in § 1404(a) favored transfer. Even if the case did not involve special First Amendment considerations, we submit this Court should grant review to consider the unjustifiable and erroneous failure below to apply the standards of § 1404(a). In any event, however, since the standards of § 1404(a) are closely intertwined with First Amendment rights in this case (Point I, *supra*), we submit certiorari should *a fortiori* be granted.

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10. Thus, the Report states that the Northern District of Illinois during 1968 enjoyed a decrease of 7.2 per cent of cases filed in 1968 from the previous year. The Report also states that "Again, the largest number of cases terminated [in the Seventh Circuit] was in the Northern District of Illinois, with 12,976 cases terminated, a decrease of 865 cases, being 6.2 per cent under the previous year."

The same Report discloses that in 1967 in the Northern District, 13,594 cases were filed and 13,841 cases were closed; in 1968 in the Northern District, 12,600 cases were filed and 12,976 cases were closed. In the Southern District of Illinois in 1967, 3,071 cases were filed and 2,800 cases were closed; in 1968 in the Southern District 2,987 cases were filed and 2,934 cases were closed.

CONCLUSION.

For the foregoing reasons, we submit that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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January 16, 1970.

APPENDIX "A".

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604.

October 21, 1969.

Before
Hon. Latham Castle, Chief Judge.
Hon. Roger J. Kiley, Circuit Judge.
Hon. Otto Kerner, Circuit Judge.

COLUMBIA BROADCASTING SYSTEM, INC., a corporation,
Petitioner,
vs.
No. 17976
THE HONORABLE JUDGE OMER POOS, CHIEF JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS,
Respondent.

Original Petition for Writ of Mandamus.

ORDER.

Petitioner has filed an application for a writ of mandamus to compel the Honorable Omer Poos to transfer the matter of *Walker* v. *The Columbia Broadcasting System, Inc.*, from the Southern District of Illinois, Southern Di-

vision, to the Northern District of Illinois, Eastern Division, pursuant to 28 U. S. C. § 1404(a);

On consideration of petitioner's request for mandamus and respondent's reply thereto, we find that petitioner has not shown that respondent has clearly abused his discretionary power pursuant to § 1404(a) and, consequently, mandamus is not appropriate. See *Butterick Co.* v. *Hubert L. Will*, 316 F. 2d 111, 113 (7th Cir. 1963).

WHEREFORE, IT IS ORDERED that the Petition for Mandamus be and it is hereby denied.

APPENDIX "B".

IN THE UNITED STATES DISTRICT COURT
Southern District of Illinois
Southern Division.

EDWIN A. WALKER,
Plaintiff,
vs.
COLUMBIA BROADCASTING SYSTEM, INC. and DONALD J. CANNON,
Defendants.

Civil No. 4281.

ORDER.

This cause comes on for determination upon the motion of defendant Columbia Broadcasting System, Inc. for change of venue, pursuant to Section 1404(a) of Title 28, United States Code, which section reads:

> "For the convenience of parties and witnesses, in the interest of justice, a district court *may* transfer any civil action to any other district or division where it might have been brought." (Emphasis supplied.)

It is the opinion of this Court that, all things being considered, including court trial docket calendars, number and locality of witnesses, among other matters, a party plaintiff is entitled to his choice of forum if at all feasible and if the forum is one provided for by law.

Accordingly, upon due consideration of all points raised

in this matter by both parties, the Court finds, in a sound exercise of its discretion, that the motion for change of venue in the instant circumstances is not well taken and should be denied.

It is so ordered.

Entered this 11th day of June, 1969, at Springfileld, Illinois.

/s/ Omer Poos,
United States District Judge,
Chief Judge.

APPENDIX "C".

LIBEL SUITS FILED BY MAJOR GENERAL EDWIN A. WALKER.

1. *Walker* v. *Associated Press,* in District Court, Tarrant County, Texas, 393 S. W. 2d 671 (Tex. Civ. App. 1965). Reversed and remanded sub nom. *Curtis Publishing Co.* v. *Butts,* 388 U. S. 130 (1967).
2. *Walker* v. *Associated Press,* in Circuit Court, Duval County, Florida, removed to the United States District Court for the Middle District of Florida (No. 64-267-Civil-J).
3. *Walker* v. *Associated Press,* in Circuit Court, Pulaski County, Arkansas, removed to the United States District Court for the Eastern District of Arkansas (No. LR-65-C-178).
4. *Walker* v. *Associated Press and Times-Picayune Publishing Corp.,* in District Court, Caddo Parish, Louisiana, 191 So. 2d 727 (La. App. 1966).
5. *Walker* v. *Denver Post, Inc. and Associated Press,* in District Court, Denver County, Colorado, Colo., 417 P. 2d 486 (1966).
6. *Walker* v. *Kansas City Star Co. and Associated Press,* in Circuit Court, Jackson County, Missouri, 406 S. W. 2d 44 (Mo. Sup. 1966).
7. *Walker* v. *Savell and Associated Press,* in Circuit Court, Lafayette County, Mississippi, removed to United States District Court for the Northern District of Mississippi, 335 F. 2d 536 (5th Cir. 1964).
8. *Walker* v. *Courier-Journal and Louisville Times Co. and WHAS, Inc.,* in United States District Court for the Western District of Kentucky, 246 F. Supp. 231 (W. D. Ky. 1965).

9. *Walker* v. *Times Publishing Co.*, Circuit Court, Pinellas County, Florida, No. 17694-L.
10. *Walker* v. *Atlanta Newspapers, Inc. and McGill*, in United States District Court for the Northern District of Georgia (Civ. No. 8590).
11. *Walker* v. *Journal Co.*, in United States District Court for the Eastern District of Wisconsin (Civ. No. 64-C-270).
12. *Walker* v. *Journal Co.*, in United States District Court for the Eastern District of Wisconsin (Civ. No. 64-C-276).
13. *Walker* v. *Gazette Publishing Co.*, in Circuit Court, Pulaski County, Arkansas (Civ. No. 58857).
14. *Walker* v. *Arkansas Democrat Co.*, in Circuit Court, Pulaski County, Arkansas (Civ. No. 58858).
15. *Walker* v. *Pulitzer Publishing Co.*, in United States District Court for the Eastern District of Missouri, 394 F. 2d 800 (8th Cir. 1968).
16. *Walker* v. *Field Enterprises, Inc.*, in United States District Court for the Western District of Oklahoma, 332 F. 2d 632 (10th Cir. 1964).
17. *Walker* v. *General Features Corp.*, in United States District Court for the Western District of Oklahoma, 319 F. 2d 583 (10th Cir. 1963).
18. *Walker* v. *Columbia Broadcasting System, Inc.*, in United States District Court for the Southern District of Illinois, Southern Division (Civil No. 4281).